77-214

No.

In the

Supreme Court of the United States

October Term, 1977

C. CLYDE ATKINS, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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SUBJECT INDEX

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER MATERIALS

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered on May 18, 1977, in the above entitled consolidated cases.

CITATIONS TO OPINION BELOW

The Judgment of the Court of Claims is not reported but is attached as Appendix D to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

QUESTIONS PRESENTED

1. Whether Congress can constitutionally provide that the exercise of authority to set judicial salaries, lawfully delegated to the President, shall be subject to veto by one house of Congress.

2. Whether Article III, Section 1, of the Constitution, providing that judges shall receive a "Compensation, which shall not be diminished. . .", prevents Congress from discriminating against judges, during a time of serious inflation, by failing to maintain the real value of judges' compensation, given that (1) the real value of the compensation of almost all other American workers has been maintained, (2) Congress has taken steps to maintain the real value of the compensation of almost all other government employees, and (3) one House of Congress has acted to veto salary adjustments that would otherwise have helped to maintain real judicial compensation.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved are Article I, Section 1; Article I, Section 7; Article II, Section 1; and Article III, Section 1. The statutory provision involved is 2 U.S.C. §359(1)(B). These provisions are printed in Appendix A to this Brief (App. 1a-4a).

STATEMENT

Petitioners in these three consolidated cases are 130 federal circuit and district judges[1] who have sued the United States for compensation due them for services since March 15, 1969. On that date the salary of a district judge was fixed by law, under the Federal Salary Act of 1967, 2 U.S.C. §§351 *et seq.*, at $40,000. The salary of a circuit judge was fixed at $42,500. Between 1969 and early 1976, when this suit was filed, consumer prices, as measured by the consumer price index, rose more than 52%. The following events also occurred:

1. In 1973, (pursuant to the system established under the Federal Salary Act of 1967, 2 U.S.C. §§351 *et seq.*)[2] a special salary commission recommended that federal judges' salaries be increased by about 25% and specifically found that amount necessary to offset "the five year cost-of-living advance". Subsequently, the President submitted to Congress a judicial salary increase of 7.5% per year for each of the fiscal years 1974, 1975, and 1976. The Senate passed a resolution disapproving this adjustment. The House did not vote on the issue. Under the terms of 2 U.S.C. §359(1)(B), the increase was thus "vetoed" by one house of Congress and did not take effect.

2. Congress annually raised the salaries of all federal employees but judges, congressmen, and a few high level Executive Branch officials (less than one half of one per-

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[1] Petitioners are listed in Appendix B (App. 5a-8a).

[2] The 1967 Act provides for a Commission on Executive, Legislative and Judicial Salaries which reviews existing salary levels every four years and makes recommendations to the President. The President then submits to Congress adjustments that take effect automatically unless disapproved by one or both houses of Congress.

cent of all federal employees). The average federal employee's salary increased by 36.5%; that of starting government lawyers by 59.32%; and that of those in the Armed Forces by more than 100%. Both the size and the salaries of Congressional staffs also increased substantially.

3. The salaries of almost all workers in the private sector, including lawyers and other professionals, roughly kept pace with inflation.

4. On August 9, 1975, the Executive Salary Cost of Living Adjustment Act[3] was passed, limiting judges to a 5% salary increase as of October 1, 1975.

Thus between 1969 and 1976, while the real value of almost all other workers' salaries stayed constant, that of judges did not. The $40,000 salary of a district judge dropped in real value to $26,249 by October 1, 1975, when it rose slightly to $27,561 due to the 5% adjustment. The $42,000 salary of a circuit judge dropped in real value to $27,889 by October 1, 1975, when it rose slightly to $29,267.

In early 1976 plaintiffs filed three separate suits, now consolidated into this single action. Plaintiffs claimed that 2 U.S.C. §359(1)(B), providing for a one-house veto of salary adjustments proposed by the President, was unconstitutional and severable from the remainder of the Postal Revenue and Federal Salary Act of 1967. The salary adjustments proposed by the President in 1974 (for fiscal years of 1974, 1975, and 1976) therefore took effect pursuant to the provisions of that Act; plaintiffs are entitled to the difference between the adjusted salaries and the salaries actually received. Plaintiffs also

[3] 5 U.S.C. §5332.

claimed their compensation had been unconstitutionally diminished in violation of Article III, Section 1, of the Constitution, due to defendant's failure to upwardly adjust by even one cent their salary levels between 1969 and 1975, while, during the same period of time, annual cost-of-living increases were granted to almost all other federal employees. (As discussed in greater detail, *infra*, it is not, nor has it ever been, plaintiff's intention that their salary levels must be adjusted on a dollar basis, in order to off-set the corresponding negative defects of inflation. See pp. 24-25, and n. 41, *infra*).

On May 18, 1977, the Court of Claims granted defendant's motions to dismiss.[4] By a vote of 4-3, the Court held that the "one-house veto" was constitutional. It also held that, because Congress had not deliberately discriminated against judges, and because a "mass exodus of officeholders from the federal bench" had not yet occurred, plaintiffs' compensation had not been unconstitutionally diminished.

Plaintiffs and the Court of Claims were aware that in February 1977 Congress passed legislation authorizing a future increase (as of March 1977) in plaintiffs' nominal dollar salaries. This action did not moot plaintiffs' claim. If the Congressional veto is unconstitutional, (or, if Article III prohibits significant diminishment of real judicial compensation), plaintiffs are entitled, at a mini-

[4] Previously, the Court of Claims had certified to the Supreme Court the question of whether its judges were disqualified from hearing this case. The Solicitor General and plaintiffs filed briefs in this Court, arguing that the judges were not disqualified and that the "rule of necessity" permitted and perhaps required the court to hear the case. On June 21, 1976, this Court dismissed the certified question. The Court of Claims subsequently determined that it was qualified to hear and to decide these issues.

mum, to the Presidential adjustment amounting to a continuous 7.5% annual increment (for each of the fiscal years 1974, 1975, and 1976), or approximately $20,000 per plaintiff, which would have accrued to them as a result of the salary levels set by the President.[5] The February 1977 increase, looking only to the future, in no way affects this legal obligation. Moreover, plaintiffs seek certiorari in this case — despite the passage of legislation that increases their future salaries — because the two major legal issues which the case presents are of continuing and vital importance to the proper functioning of, and relationship among, the three major branches of the federal government.

This petition will first discuss the question of the constitutionality of the one-house veto, which divided the Court of Claims 4-3. This issue is, in the words of the Solicitor General, "unquestionably significant . . . important and recurring,"—an issue which ought to be decided in an *appropriate* case. (In this reference, the Solicitor General cited our case.) Brief of the Solicitor General, *Clark* v. *Kimmitt,* No. 76-1105 (October term 1976).[6] This petition will then discuss the Compensation Clause of Article III, Section 1, an issue which is also of ongoing significance in the context of judicial independence.

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[5] While the $20,000 is important to each federal judge, the basic principle which has stimulated this suit is the threat to judicial independence inherent in Congressional assertion of the power to cut the real value of judicial compensation. (See pp. 21-31, *infra.*)

[6] Plaintiffs understand the Government's position on this question to be that a one-house veto is unconstitutional in the context of the present case, while contending it to be constitutional in the context of government reorganization. See, note 11, *infra.*

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IN A CLEAR, FOCUSED MANNER THE QUESTION OF THE CONSTITUTIONALITY OF THE ONE-HOUSE VETO—A QUESTION OF GREAT INSTITUTIONAL AND PRACTICAL IMPORTANCE, WHICH REQUIRES AUTHORITATIVE JUDICIAL DETERMINATION.

Under the Federal Salary Act of 1967, 2 U.S.C. §§351 *et seq.,* Congress provided that a Presidential decision to increase judicial salaries[7] would automatically take effect as law, but, in the words of §359,

> only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—
>
> (A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,
>
> (B) neither House of the Congress has enacted *legislation* which specifically disapproves all or part of such recommendations, or
>
> (C) both. [emphasis added][8]

In early 1974, acting pursuant to this law, the President adjusted judicial salaries, by authorizing a 7.5% increase to take effect each year for the fiscal years 1974, 1975 and 1976. On March 16, 1974, the Senate, acting pursuant to clause (B) of §359, disapproved the President's au-

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[7] The decision would take place only after the President received the advice and recommendation of a special Salary Commission.

[8] Congress, in the use of the word *legislation,* though inappropriate for one-house action, recognized that it interpreted the power it sought to exercise as "legislative".

thorization. Plaintiffs contend that §359 (B) — providing for a one-house veto — is unconstitutional and severable from the remainder of the 1967 Act. Therefore, the salary adjustments took effect.

A. Article I, Section 1, of the Constitution vests all legislative powers "in a Congress" which shall consist of *both* "a Senate and House of Representatives." The principle implicit in this provision — that "every exercise of 'legislative powers' [must] involve . . . the concurrence of the two Houses," S. Rep. 1335, 54th Cong., 2nd Sess. 8 (1897) and thus must, under Article I, Section 7,[9] be presented to the President for his signature or veto, was followed consistently until 1932. Since then, Congress has enacted from time to time legislation that purports to allow one (or both) houses of Congress (or committees of one House) to repeal or to modify authority previously delegated by law to the President, by passing a resolution "vetoing" a lawful exercise of that authority.

The constitutional validity of the legislative veto has never been upheld.[10] To the contrary, Presidents have not only vetoed such measures, but, since Herbert Hoover,

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[9] Article I, Section 7, Clause 3, provides that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives shall be necessary" must be presented to the President for his signature or veto.

[10] Although *Buckley* v. *Valeo,* 424 U.S. 1 (1976), did not reach the question, Justice White mentioned it in a concurring opinion and suggested that the legislative veto may be constitutional. In *Clark* v. *Valeo,* .... F. 2d .... (D.C. Cir. 1977), in which a majority held the issue not justiciable, Judge McKinnon, authoring a separate opinion, considered the question in detail and expressed the firm opinion that the one-house veto was unconstitutional.

every President, supported by the opinion of his Attorney General, has argued that such provisions violate the Constitution.[11] The opinion of the Department of Justice,[12] that of scholars in the field[13] and that of many Senators

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[11] See, Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," 63 *Calif. L. Rev.* 983 (1975).

The present Administration apparently believes that the one-house veto is unconstitutional in many contexts, but constitutional in the context of Executive Branch reorganization. See opinion of the Attorney General on the constitutionality of the one-house veto provision of the Executive Reorganization statute (Jan. 31, 1977).

[12] The Administration of President Ford conceded the unconstitutionality of the one-house veto in this case which was specifically recognized by the Court of Claims at p. 49 of its opinion. See also, Testimony of Assistant Attorney General Antonin Scala, Office of Legal Counsel, Department of Justice, before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, May 15, 1975.

[13] See Ginnane, "The Control of Federal Administration by Congressional Resolutions and Committees," 66 *Harv. L. Rev.* 569 (1953); Watson, *op. cit, supra:* Bolton, *The Legislative Veto: Unseparating the Powers* (American Enterprise Institute 1977). See generally the testimony collected in "Providing Reorganization Authority to the President" *Hearings on H.R. 3131 before a Subcommittee of the House Committee on Government Operations,* 95th Cong., 1st Sess. (1977), particularly the letter from Antonin Scalia, at 60. For a view more favorable to the veto's constitutionality, see Stewart, "Constitutionality of the Legislative Veto," 13 *Harv. J. Legislation* 593 (1976) See also Miller & Knapp, "The Congressional Veto: Preserving the Constitutional Framework," 52 *Ind. L.J.* 367 (1977).

and Representatives,[14] is contrary to the validity of such clauses.

It is unlikely that any previous case has squarely presented to this Court the legislative veto question. Until recently, Congress enacted few statutes containing such vetoes. Moreover, in the past, legislative vetoes were rarely exercised, as we shall point out, because of the nature of the legislation involved. Further, some exercised vetoes involved the proposed expenditure of budgeted funds[15] or proposed governmental reorganization, where standing may be difficult to obtain. Finally, cases raising this issue here have been more appropriately decided on other grounds, see *Buckley* v. *Valeo,* 424 U.S. 1 (1976), or involved serious problems of ripeness or mootness. *See Clark* v. *Kimmit,* No. 75-1105, (October term 1976).

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[14] See, *e.g.*, 76 *Cong. Rec.* 3539 (1933) (Senator Byrnes); 84 *Cong. Rec.* 2477-78 (1939) (Representatives Taber and Wolcott); 83 *Cong. Rec.* 3090 (1939) (Senator King); 87 Cong. Rec. 1100, 1245, 1269, 1569, 2063-7 (1941) (Senators Clark, Gillette, McCarran, and Murdock); 87 *Cong. Rec.* 6504-07 (1941) (Senators Adams and Taft); 97 *Cong. Rec.* 5443 (1951) (Representative Patman); 100 Cong. Rec. 5095 (1954) (Senator Dirksen). See Watson, *op. cit., supra* at 988.

[15] Of the sixty-four resolutions enacted between 1960 and 1975 pursuant to legislative veto authority, forty related to budget expenditure, deferrals and recessions. Of the remainder, eight were concurrent resolutions for the release of materials from the national stock pile, and five involved disapproval of executive reorganization measures. Three concerned federal employee pay levels; two, price controls on crude oil; two, election campaign practices; and one each concerning nuclear material use by foreign countries, and extending and fixing guidelines for the preservation of Presidential records. U.S. Library of Congress, "Interim Report on the Exercise of Congressional Review, Deferral and Disapproval Authority Over Proposed Executive Actions, 1960-75."

The constitutional issue, however, is of growing importance. While the issue was not of overriding importance in the past, the current situation has become far more serious. The number of resolutions or bills introduced in Congress that embody legislative vetoes has multiplied. A survey by the Library of Congress shows that of the 192 bills embodying legislative vetoes enacted between 1932 and 1975 more than half were enacted since 1970. Moreover, of 351 resolutions introduced between 1960 and 1975 for the purpose of vetoing Executive action taken under such bills, 244 were introduced in 1974 or 1975. Of the sixty-four such resolutions approved since 1960, 44 were approved in the single last year of the survey.[16]

This growing tendency to insert legislative vetoes in substantive legislation, together with the importance of removing serious legal clouds that might otherwise overhang critically important proposed legislation,[17] suggests that this Court[18] and the Solicitor General[19] are correct in recognizing the issue as important. This case presents the question squarely. Each branch of the federal govern-

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[16] The survey referred to in note 15 above indicates that to hold the one-house veto unconstitutional is unlikely to cause any serious practical disruption in the administration of ongoing governmental programs.

[17] Consider, for example, the Administration's recent energy proposals. The House of Representatives is reported to have recently voted to subject exercises of the power to set natural gas prices to a one-house veto. *Washington Post,* June 3, 1977, p. 1. If this bill becomes law, gas producers will be uncertain of the validity of the prices they charge until the new law is tested in court—a process that could take months or years. In the meantime, the uncertainty will discourage badly needed investment.

[18] *Buckley* v. *Valeo,* 424 U.S. 1, 140, n. 176.

[19] Brief in *Clark* v. *Kimmit, supra* p. 6.

ment, including the Senate and the House of Representatives as *amici,* is represented by counsel and has briefed the issue below. Plaintiffs are aware of only two other cases presenting this issue now before the courts.[20]

B. While not arguing the merits in detail in this petition,[21] plaintiffs wish to call the Court's attention to the very basic nature of the constitutional issues raised by the majority opinion of the Court of Claims. For example, it is a fundamental constitutional tenet that Congress possesses only those powers delegated to it by the Constitution—powers that, with a few specifically designated exceptions,[22] are legislative in nature. The Court of Claims apparently suggests, however, that in exercising the one-house veto, a house is not engaged in a legislative act. Ct. Cl. Op. 55-60 (Appendix D). Yet how can this be? To exercise such a veto is not to act under authority otherwise specifically delegated to Congress by the Con-

[20] *Chadha* v. *Immigration and Naturalization Service,* No. 77-1702 (9th Cir.) currently pending before the Ninth Circuit, raises the question. Plaintiff, an alien, was ordered deported by a Congressional Committee under legislation delegating such power to a single committee of Congress. Agreement between plaintiff and the government may moot that case, however, before it reaches this Court. Also the Court of Appeals for the Fourth Circuit has yet to decide *McCorkle* v. *United States,* which also raises the issue, in a somewhat different context, of the constitutionality of Clause B of the Federal Salary Act of 1967.

[21] The merits are briefed extensively in three briefs submitted by plaintiffs in the court below and in responses by *amici*—the Senate and the House of Representatives. Copies of these briefs are available to the Court upon request from the Court of Claims. These issues are also thoroughly discussed in the articles cited in note 13 *supra.*

[22] The Constitution specifically delegates a number of nonlegislative powers, such as the power to confirm Presidential appointments, to one or the other house.

stitution. It is not an act (like information gathering) necessary to the legislative process. It is not a housekeeping detail. Where then, if it is not legislative, does a single House of Congress obtain the power to perform it?[23] Significantly, clause (B) itself refers to the adoption of *legislation* by either house. (See n. 8, *supra.)*

More importantly, the sections of the Constitution that grant authority to perform legislative acts reflect basic compromises designed to produce legislation that reflects a national, rather than a sectional, will. Both the principle of Presidential participation (embodied in the Presentment Clause, Art. I, Sec. 7, cl. 2) and the principle of bicameralism (embodied in the requirement that *both* houses approve *each* individual legislative action) were designed to prevent subgroups within Congress from legislating on their own.[24] Yet, the one-house veto allows such a subgroup to legislate. If a broad delegation of authority contains a one-house veto, the details of that authority may be filled, not by the administrative process nor by the legislative process (involving both houses and the President), but rather by a single house (or a single committee) simply vetoing contrary proposals made by the Executive. The one-house veto can thus exemplify that very delegation of legislative authority to subgroups

[23] *Amici* suggested in the court below that the "Necessary and Proper Clause" might bestow such power. But that clause cannot grant Congress power to legislate in any way it wishes (*i.e.* in a manner contrary to that provided in Article I), nor could it authorize Congress to engage in nonlegislative tasks (except those *specifically* delegated to Congress elsewhere in the Constitution). Otherwise Congress would be free, for example, to delegate judicial power to a subcommittee, or to ignore the procedural requirements for the enactment of legislation specifically set out in the Constitution.

[24] See Ginnane, n. 13, *supra,* at 594; Watson, n. 11, *supra.*

within Congress—its exercise unchecked by the need to secure the approval of the Congress as a whole—that the principles of presidential participation and of bicameralism were intended to prevent.

C. There are no ready answers to these constitutional difficulties. One cannot, for example, accurately characterize the one-house veto as a "practical" or "desirable" legislative device needed to check the power of the President. Congress has a host of alternative practical checks available.[25] And those checks, unlike the veto, cannot be used to grant to a single house (or to a single committee or committee chairman) the practical power to write (without check) the details of broadly phrased legislation, or to decide, on its own, for example, who shall and who shall not, receive tax rebates, or who shall be deported.[26]

[25] For one thing, Congress can provide that the legislation delegating authority expires in a short time. Thus the President will have to seek the approval of both houses of Congress for what he does by requesting the enactment of new legislation if he is to continue to exercise the authority. For another thing, Congress can tailor its statutes more specifically, thereby limiting the power that it fears the Executive will exercise in an undesirable way. Further, as in the present case, Congress can require the President, before taking action, to consult with Congressional representatives, whose views will carry significant political weight. Congress can also delegate the power at issue to an appropriately constituted commission for final decision. Finally, as in Clause (A) of the 1967 Act, (and the Federal Rules of Civil Procedure), it can provide that implementation of the Executive action will be delayed until it has time to consider it and to enact legislation preventing the Executive's action from taking effect. While the President's signature would be required, it is unlikely that in a salary matter like the present one, he would override Congressional views.

[26] See *Chadha* v. *Immigration and Naturalization Service*, discussed at n. 20, *supra*.

Simply stated, a single house or committee *thereof* cannot grant to itself the power to perform acts which Article II, Section 1 confers exclusively to the President: acts which by their nature or by lawful delegation are executive functions.[27]

Nor can one resolve the constitutional question by referring to the Separation of Powers doctrine as "a political maxim, not a technical rule of law," Ct. Cl. Op. 64,[28] or by arguing that the line between Executive and Legislative functions is blurred—that the "Constitution expects a certain blending of powers." Ct. Cl. Op. 65. In some instances—such as rule making—powers are in-

[27] Congress has apparently since recognized this fact. At the time the Senate exercised the one-house veto under § 359(1)(B) in 1974, and at the time this action was commenced, the statute in question provided that the President's pay adjustments became effective *unless* within thirty days, one house of Congress disapproved them. Thus, one house was empowered to "undo" an executive act. Had Congress done nothing, the raises would have taken effect. On April 12, 1977, however, the Act was amended by Section 401 of Pub. L. 95-19 to provide that the President's recommended salary adjustments would not take effect until *both* the Senate and the House had voted to approve them. While this mechanism does not resolve the unconstitutionality of the legislative veto in terms of Article I, Sections 1 and 7, it may be viewed as a recognition by Congress that the former provision invaded the President's exclusive executive powers in violation of Article II, Section 1. Under the prior provision, the salary increase is the result of the President's action; if Congress does nothing, the salary adjustments occur. Now, the President's actions do not cause salary levels to be adjusted. If Congress does nothing, salary levels remain unchanged. Since the plaintiffs' salary adjustments were barred under the former provision, of course, Senate Resolution 293 was unconstitutional under both Articles I and II.

[28] See, for example, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

deed blended. See *e.g., Yakus* v. *United States,* 321 U.S. 414 (1944). Since all three branches of government inherently possess the power to make rules, it is obviously difficult to draw lines determining *how much* rule making authority Congress can grant the Executive before "rule making" becomes impermissible legislating. That difficulty, however, has never prevented courts from stopping any branch from exercising power plainly outside its constitutionally granted authority. *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880). Thus, the courts have held that judges cannot give advisory opinions, for Article III does not grant them power to do so. *Muskrat* v. *United States,* 219 U.S. 346 (1911). And, members of Congress cannot take Executive action for the same reason.[29] *Springer* v. *Philippine Islands,* 277 U.S. 189 (1928); *Buckley* v. *Valeo,* 424 U.S. 1 (1976). It is difficult to believe that a court would sanction legislation that authorized one house or one committee to adjudicate a case or controversy or to "veto" complaints filed in a district court. The issue raised in this case is whether legislation authorizing one house of Congress to veto the exercise of validly delegated rule making authority is not just as plainly outside the powers granted to Congress by the Constitution, either because it does not constitute the enactment of legislation in accordance with the provisions of Article I or because it constitutes the unauthorized exercise of an Executive act in violation of Article II, or both.

Finally, it is misleading to claim that the insertion of a one-house veto in a piece of legislation does no more than to require the consent of both houses of Congress and the President before changes in the law take place—precisely the same result as the enactment of new legislation, Ct. Cl. Op. 60. The two methods have very different

[29] See n. 27, *supra.*

practical consequences. (Indeed, were this not so, legislators would not wish to include such a provision in their bills.) The difference appears obvious if one focuses upon the veto of detailed administrative decisions—decisions to award defense contracts, to make tax rebates, to write regulations. In such cases, to give one house the power to veto is effectively to give *one* house the power to make a detailed decision, a decision that would otherwise have been made either by the President or would at the least have been the subject of focused debate by *both* houses of Congress and the President.

D. In the Court below, the Government argued that Clause B is unconstitutional, but not *severable* from the remainder of the Act. An examination of the law on severability and the relevant legislative debates—which we shall summarize briefly here—strongly demonstrates, however, that Clause B is severable. At least three, and possibly all seven judges of the Court of Claims reached this conclusion.[30]

This Court's test respecting severability was laid down in *Champlin Refining Co.* v. *Corporation Com'n,* 286 U.S. 210, 234 (1932):

> "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law."

[30] Three Court of Claims judges specifically wrote that Clause B was severable. The remaining four judges held that Clause B was constitutional and did not discuss severability. Since a holding of non-severability would have allowed the judges to avoid the constitutional question, the fact that they reached and decided that question may reflect a belief that Clause B is severable. *Cf. Ashwander* v. *TVA,* 297 U.S. 288 (1936).

See also *Electric Bond and Share Co.* v. *SEC,* 303 U.S. 419, 433-39 (1938), *Tilton* v. *Richardson,* 403 U.S. 672, 683-84 (1970).[31]

It is plain that without Clause B the remainder of the Act is, in the words of *Champlin,* "fully operative as law;" it is capable of standing alone, (See discussion regarding Clause (A), *infra,* at p. 19). It is also apparent that, had Congress known of Clause B's unconstitutionality, it would still have enacted the remaining provisions.

An examination of the legislative history of the relevant Act, the Postal Revenue and Federal Salary Act of 1967[32], shows that neither the "one-house veto" nor judicial salary levels were of importance to the debate. The major salary issue concerned whether Congress should create a Commission that could set *Congressional* salaries. The House strongly favored the idea of a Commission; the Senate opposed it. At the last minute the Senate gave way in return for concessions on junk mail rates under other provisions of the Act.[33]

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[31] This test stems from the general presumption in favor of constitutionality. In giving "full effect . . . to such [provisions] as are not repugnant to the Constitution," *Bank of Hamilton* v. *Dudley,* 2 Pet. 492, 526 (U.S. 1829), it simply applies "the cardinal principle of statutory construction . . . to save and not to destroy," *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30 (1937). It thus applies virtually unchanged whether or not the statute contains an express severability clause. *Tilton* v. *Richardson,* 403 U.S. 672, 683-84 (1970), *United States* v. *Jackson,* 390 U.S. 1 (1976); Stern, "Separability and Separability Clauses in the Supreme Court," 51 *Harv. L. Rev.* 76, 79 (1937).

[32] See 113 *Cong. Rec.* at 8493, 27288, 28406, 28409, 28411, 28612, 28641-4, 28622, 28879, 33590, 33972, 34013, 34014, 34022-3, 34212-5, 34220-2, 34236, 34241, 34255, 34261, 34410, 35524, 35811, 35822, 35839-41, 36088, 36100-8.

[33] See 113 *Cong. Rec.* 36102.

The Commission's opponents argued that Congressmen should be required to cast a clear, public vote on their own salary levels. This objection was met in several ways: 1) An amendment was passed, allowing Senators to vote on each part of a proposed increase separately, thereby preventing them from hiding a vote increasing their own pay by voting generally on the subject (See 113 *Cong. Rec.* 36100, 36101). 2) The Conference Committee eliminated a provision that might have allowed a Senator to hide a vote for an increase by voting for a wage/expense package. 3) Proponents of the Commission pointed to clause (A), giving both houses a chance to disapprove a proposed pay increase by enacting legislation to the contrary.

Throughout the debates Clause A and Clause B were referred to together. *No one* argued that (B) was of particular importance. This fact is not surprising, for (A), which would delay a proposed pay raise from taking effect so that *Congress might enact legislation to the contrary, was surely sufficient* to achieve Congress's major purpose. The introduction of such legislation would force each Congressman to vote for or against a proposed pay increase. If a house voted down its own pay increase, the other house would not force a pay increase upon it. And, it is inconceivable that if both houses voted not to take a pay raise themselves, the President would refuse to sign such a measure into law. As practical matter, Clause (B)—which is here at issue—offered little additional protection beyond Clause (A), which is plainly constitutional. Its retention was not needed to satisfy any major Congressional objective.

This conclusion is reinforced by the fact that the relevant Act of which clause (B) forms a part, deals not only

with federal salaries, but also (and primarily) with mail rates. (P.L. 90-206, found at 81 Stat. 613). The political debate and the resulting legislative modifications intimately tied together the Salary Commission and postal rates. (See *e.g.*, 113 *Cong. Rec.* 36102). Thus, to hold clause (B) unconstitutional and not severable is to risk making unlawful most postal rates, the salaries paid postal workers, and the salaries paid to nearly all other government employees since 1967. The prospect of these consequences led the three dissenting judges in the Court of Claims to characterize such a result as "patently ludicrous" (Ct. Cl. Op. 92) and absurd (Ct. Cl. Op. 102). As previously noted, the remaining four judges did not reach the issue or consider its consequences. It is absurd to think that Congress would have preferred such a result to the continued operation of the statute without Clause B (any untoward result of which Congress could far more easily repair). Rather, the presence of clause (A), the Byrd Amendment, and the delay before the President's recommendations take effect, together with the legislative history (showing that the basic argument was about delegation itself and the need for legislators to reveal publicly their positions on legislative salaries) all suggest clause (B) was not essential to any Congressional purpose and that Congress would have preferred that the Postal Revenue and Federal Salary Act of 1967 stand without it.[34]

[34] Our research also discloses some relevant precedent in previous Executive Branch treatment of bills with one-house veto clauses. Presidents, believing such clauses unconstitutional, have signed bills containing them when they believed that the offending clause was severable. [See Jackson, "A Presidential Legal Opinion", 66 *Harv. L. Rev.* 1353 (1953).] Otherwise they apparently would have vetoed the bill. President Johnson seemingly believed

II. WHETHER PLAINTIFFS' COMPENSATION HAS BEEN DISCRIMINATORILY DIMINISHED IN VIOLATION OF THE CONSTITUTION IS ALSO AN ISSUE OF LONG RANGE INSTITUTIONAL IMPORTANCE, WHICH OUGHT TO BE RESOLVED BY THIS COURT.

A. Article III, Section 1, of the Constitution provides that judges shall receive "a Compensation, which shall not be diminished." Plaintiffs believe that this clause does not simply protect the nominal dollar value of a judge's salary but that it offers *some* protection for a judge's real compensation as well. Specifically, it protects this compensation during a time of serious inflation when Congress maintains the real compensation of others but not that of judges.

Plaintiffs base their claim upon four grounds.[35] First, the purposes of Article III, Section 1, demand protection

[34] (Continued)
clause (B) unconstitutional [See e.g. *Public papers of the Presidents of the United States*: Lyndon B. Johnson 1963-68, at 861-62, 1249-51 (1965); 1 Weekly Comp. Pres. Docs. 132, 432-33 (1965); 111 *Cong. Rec.* 12639-40 (1965))], yet he signed the 1967 Act—a fact that suggests he also believed clause (B) was severable.

[35] In the Court below, the government also argued a) that the Court of Claims lacked jurisdiction, and b) that this claim raised a "political question." Plaintiffs consider both these contentions to be without foundation. Jurisdiction in the Court of Claims rests upon 28 U.S.C. §1491 which gives that court jurisdiction

> "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . ."

This claim is founded upon Article III, Section 1, of the Constitution, which imposes upon the United States a "duty to pay" a judge continued compensation once it has initially been set by Congress. *Cf. Jacobs* v. *United States*, 290 U.S. 13 (1933): *Bivens* v. *Six Unknown Named Agents*

of real, not nominal dollar, compensation. The major purpose of that clause is to free judges from any feeling of dependence upon the legislature for the maintenance of their compensation. See *Federalist* No. 51 (Madison), *Federalist* No. 79 (Hamilton). It is designed to help render the judge "perfectly and completely independent, with nothing to influence or control him, but God and his conscience." Marshall, C.J., quoted in *Evans* v. *Gore*, 253 U.S. 245, 250 (1920).[36]

If the Compensation Clause protects *only* nominal dollar compensation, this objective cannot be achieved, for during a time of serious inflation, each and every decision by Congress concerning the maintenance of judges' real compensation has precisely the same effect on judicial independence as a decision to cut judicial compensation when prices are constant. In both situations, judges must fear, in precisely the same way, that negative Congressional action will force them to spend their savings, to look for ways to supplement their income, or to accept radical change in their way of life.[37]

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[35] (Continued)

of Federal Bureau of Narcotics, 403 U.S. 388 (1971). This claim falls within none of the legal categories set forth in *Baker* v. *Carr*, 369 U.S. 186 (1962) and thus does not constitute a political question. *Cf. Powell* v. *McCormack*, 395 U.S. 486 (1969). The Court of Claims rejected out of hand these two arguments of the Government. We do not conceive that these specious arguments will be renewed in this Court.

[36] A further purpose of the clause was to attract highly qualified men to the bench. 1 *Kent Comm.* 294. A final purpose was to reinforce the "tenure of office" requirement by preventing diminished salaries from forcing judges to leave the bench. 2 *Story* §1628.

[37] Thus, the effect of a Congressional decision not to keep real income constant during inflation is totally different from a decision not to increase real income. Congressional

Second, the history surrounding the adoption of the Compensation Clause, while not determinative, apparently supports plaintiffs' interpretation. The Constitution's Framers were fully aware of the problem of inflation. They had seen the price level rise 188% between 1775 and 1781.[38] They had seen the judges of the Virginia Court of Appeals argue that "the various substitutions of paper money . . . for specie . . . operating greatly to the diminution of their salaries," constituted a departure from constitutional principle. *Remonstrance of the Judges*, 4 Call (Va.) 135 (1788). Against this background, Madison's words and actions in the Constitutional debates suggest he meant "Compensation" to refer to "real compensation".[39]

Third, this Court has uniformly interpreted the Compensation Clause broadly in accord with Madison's intent

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[37] (Continued)

power to *increase* real income—a power left to its discretion under Article III, Section 1—may raise expectations and hopes but it does not create the type of dependence created by the power to *diminish* real income. It is the latter that produces fear of lower living standards (quite different from hopes of higher ones), and it is this fear that is produced in an identical way by the power to cut nominal dollar salaries when prices are rising. See generally, O. Ritter & W. Silber, *Money* 28-29 (1970).

A failure to maintain real compensation in the presence of severe inflation also discourages recruitment to the bench, [see, *e.g.*, affidavit of Senator Percy, submitted in support of plaintiffs' motion for summary judgment in the Court of Claims, and Sprecher, "The Threat to Judicial Independence," 51 *Ind. L.J.* 380 (1976)] and forces sitting judges to resign.

[38] See, *Historical Statistics of the United States—Colonial Times—1957*, 116. Suits by persons for payment in real, rather than nominal, currency were well known at the time.

[39] See Appendix C (p. 9a).

that judges be "as little dependent as possible" on the other two branches. *Federalist* No. 51. Thus, in *Evans* v. *Gore,* 253 U.S. 245 (1920), the Court held that the Clause must be construed, "not restrictively, but in accordance with its spirit . . ." 253 U.S. at 253-54, and that the Clause prohibited any diminution whether it was "direct . . ., indirect, or even evasive." 253 U.S. at 254. In *O'Donoghue* v. *United States,* 289 U.S. 516 (1933), the Court, reiterating the need to keep the judiciary "free from the remotest influence, direct or indirect, of either of the other two powers," held that a judge, in regard to his compensation, should "have no apprehension lest his situation may be changed to his disadvantage."[40] See also *Miles* v. *Graham,* 268 U.S. 501 (1925).

Evans v. *Gore* was much criticized, for it held that judges could not be subjected to an income tax laid uniformly on all citizens. *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939), which held that Congress could make *future* judicial appointments subject to tax, is thought by some to represent a retreat from *Evans.* It is important to note, however, that the *Woodrough* Court did not overrule *Evans* (while it did overrule *Miles*) and did not retreat from the *principles* respecting the meaning, scope and purposes of Article III, Section 1, laid

[40] The Court went on to state:
In the light of the foregoing views,—time honored and never discredited—it is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation, not for his private advantage—which, if that were all, he might willingly forego—but in the interest of preserving unimpaired an essential safeguard adopted as a continuing guaranty of an independent judicial administration for the benefit of the whole people. 289 U.S. at 533.

down in any of the earlier cases. Rather, that Court suggested that a *nondiscriminatory* tax laid generally upon *all* persons did not violate the Compensation Clause, for, as Justice Holmes (dissenting in *Evans*) put it, "[t]o require a man to pay the taxes that *all* other men have to pay cannot *possibly* be made an instrument to attack his independence as a judge." (Emphasis added). 253 U.S. at 265. While a judge is most unlikely to believe that hostility to his opinions could affect a Congressional decision to impose a general income tax, he might easily believe that hostility to his opinions could affect a Congressional decision against maintaining real judicial compensation.

Fourth, the alternative to accepting plaintiffs' interpretation of Article III, Section 1, is to adopt an interpretation (that "compensation" means only "nominal dollar" compensation) which will reduce the protections of that Article to a nullity. As the judges of the Virginia Court of Appeals remonstrated in 1788:

> vain would be the precautions of the founders of our government to secure liberty, if the legislature, though restrained from changing the tenure of judicial offices, are at liberty to compel a resignation by reducing salaries to a copper. 4 Call (Va.) 135, 145.

Serious inflation has precisely that effect; it can reduce the actual dollar value of salaries by several percentage points per year; over a ten year period, even a "mild" 7% inflation rate will cut actual salaries in half.

On the other hand, to accept plaintiffs' interpretation of the clause does *not* necessarily mean that Congress must adjust judicial salaries with every jog in the Consumer Price Index. Rather, the clause can be interpreted in a practical manner consistent with its purposes. It need impose no more than an obligation to ad-

just the nominal salaries of judges from time to time so that there is no serious decline over a period of years,[41] *and* (following the suggestion of Justice Frankfurter in *Woodrough* and Justice Holmes in *Evans*) to act *non-discriminatorily* when adjusting governmental salaries.[42]

B. The Court of Claims evidently accepts plaintiff's basic argument, for it interprets the Compensation Clause "to provide protection against the diminution of judges' compensation in the event of a discriminatory attack on the judiciary." Ct. Cl. Op. 38. If the Court of Claims is correct in believing that the Clause would forbid discriminatory decreases in nominal salaries during serious

[41] In this respect, the obligation that Article III, Section 1, imposes upon Congress is like the obligation that the Equal Protection Clause imposes upon the States in the area of electoral apportionment. Although the basic Constitutional obligation is "one man, one vote," *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the states have broad leeway as to the particular apportionment plan they adopt. Only when this range of discretion is exceeded will the Courts hold a plan unconstitutional. Similarly, as long as Congress adjusts nominal salaries from time to time, so that judges' actual salaries are not cut to a significantly greater extent than those of other federal officials or those of the average American worker, the evils that the Compensation Clause protects against cannot arise.

[42] In doing so, it would follow a tradition deeply embedded in constitutional law. Thus, for example, the Constitution forbids the imposition of a "tax or duty" upon exports, Article I, Section 9. Nevertheless, the Court has sustained the validity of a general tax on net income even though that income is derived in part from exporting, as long as "there is no discrimination." *Peck & Co.* v. *Lowe*, 247 U.S. 165, 175 (1918). Similarly, even though a state cannot interfere with interstate commerce, it can tax the net receipts derived from interstate commerce, or even gross receipts, always assuming "there be no discrimination against interstate commerce." *United States Glue Co.* v. *Oak Creek*, 247 U.S. 321 (1918); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938).

inflation, the word "compensation" must mean real compensation.

The court went on to reject plaintiffs' claims, however, on the ground that plaintiffs failed to show discrimination. The court states:

> "While federal judges may well have borne the brunt of inflation in recent years, they have not been alone. They are part of a class, not large in relation to the total number of employed Americans, but numbering about 2,500 judges, civil servants on the Executive Schedule, and Members of Congress, and 20,000 GS-15 through -18 civil servants. If Congress intended to mount an attack on the independence of the judiciary by means of a salary freeze in the face of high inflation, why would it have included in the freeze the top level civil servants and even, to a lesser extent, its own Members? . . . Reasons other than a desire to punish the judges or drive them from office appear to lie behind the 7-year omission of a pay raise. Ct. Cl. Op. 44-45.

This paragraph—the crux of the Court's opinion—raises three serious problems. For one thing, as a factual matter, the class of government employees treated like judges was far smaller than the court suggests. While the court correctly questions the inclusion of Members of Congress[43], it incorrectly states that 20,000 GS-15 through -18 civil servants should be grouped with the judges. In fact, as the court's opinion notes earlier (at p. 17), between 1969 and 1976, pay *increased* "in the so-called 'super grades' GS 16-18 by 48.9%." Aside from judges, only a handful

[43] The Court notes that "Members of Congress have in recent years given themselves substantial adjustments in staff, travel, and certain other tax-free expense allowances, all of which tend to ease the impact of inflation." Ct. Cl. Op. 44, n. 11.

of persons in top level politically sensitive positions, suffered a serious diminution in real compensation.

More important, the Court of Claims uses an incorrect standard for judging the existence of discrimination. The court evidently believes plaintiffs must show a subjective intent on the part of Congress to interfere with judicial independence. The issue, however, is not subjective Congressional intent. Rather it is the objective threat (or perceived threat) to the independence of the judiciary. The correct question is whether a grant to Congress of the power at issue could lead judges to suspect (or the public to think they suspect) any relationship between how they decide cases and the maintenance of their compensation. As long as Congress remains free to force the judiciary to accept a cut in real compensation, simply by placing it in a group with a handful of others whose compensation is not maintained, this question must be answered in the affirmative.[44]

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[44] This standard is suggested by this Court's treatment of similar cases under the Commerce Clause. States may tax or restrict interstate commerce as long as they tax or restrict intrastate commerce similarly, see *South Carolina Hwy. Dept.* v. *Barnwell Brothers, Inc.*, 303 U.S. 177 (1938), but a state cannot save an ordinance which discriminates against interstate commerce simply by grouping a certain amount of local commerce along with it in the disfavored class. *Dean Milk* v. *City of Madison*, 340 U.S. 349, 354 n. 4 (1951). Nor is a law that discriminates against blacks saved from invalidity simply because a number of whites may also be adversely affected. The Court should also note that Justice Holmes, dissenting in *Evans*, and Justice Frankfurter, writing in *Woodrough*, would sustain the constitutionality of taxing judges' salaries, *not* because a handful of others were taxed as well, *nor* because plaintiffs failed to prove a discriminatory intent; but, rather, because the income tax applied to virtually *all* other persons. Thus it could not *possibly* have been perceived as a threat to independence. See *Evans* v. *Gore, supra* at 265; *O'Malley* v. *Woodrough, supra* at 282; Brief of the Solicitor General in *O'Malley* v. *Woodrough* at 12.

Further, in terms of the purposes of the Compensation Clause, it is singularly inappropriate to classify judges together with Congressmen, Presidential appointees, and a few top civil servants. These latter all hold politically sensitive jobs. It may be realistic that their compensation respond to political pressures; it is totally undesirable for judicial compensation so to respond. The very purpose of Article III is to guarantee the contrary. Thus, it is not surprising that the one case considering this type of issue, *Commonwealth* v. *Mann*, 5 Watts & Serg. 403 (Pa. 1893) held that a direct tax upon salaries of *all public* officials taxed judges *discriminatorily*. (See Brief of the Solicitor General in *Woodrough*, at 33-34).

Finally, it is both difficult and inappropriate for a court to attempt to assess whether Congress subjectively intended to threaten the judiciary. Congressmen frequently criticize the judiciary—often quite vigorously.[45] One can readily find references to criticism of judicial actions in Congressional discussion of judicial salaries.[46]

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[45] See, *e.g.*, 122 *Cong. Rec.* E3901-3902 (Aug. 20, 1976): "It is clearly the courts that are at fault; it is their illogical and inconsistent interpretation of the law that is the problem, not the actual law. . . . Such obvious overstepping of bounds by the courts is precisely why the Founding Fathers gave Congress a means to check the power of the courts." Or, consider 122 *Cong. Rec.* S14989 (Aug. 31, 1976): "Today we have judges virtually accountable to no one, invading the sphere of the people's elected representatives, handing down decisions which have adverse impact on the lives of all of us."

[46] In September 1976 Congress refused to appropriate money to pay for a cost of living increase for the judiciary authorized by law. One speaker commented as follows:

> "The plain fact is this, that even under the interpretation of the gentleman from Illinois, we are saying

The Court of Claims test, in making the lawfulness of Congressional action turn on the presence or absence of such criticisms, would require an assessment of the impact of such criticism on later Congressional action. It may thereby inhibit the expression of such views by Members of Congress. Yet, surely it is not the purpose of Article III, Section 1, to inhibit or to forbid, in any way, the expression of Congressional criticism of the judiciary.[47]

C. Despite the recent 28.9% judicial pay increase approved by Congress in February 1977, the basic issue here raised—the extent to which the Compensation Clause offers protection in time of inflation—is of continuing importance. Inflation continues and is likely to remain a problem throughout the foreseeable future.

Congress, frequently will have to consider whether to maintain judicial compensation—and whether to appropriate funds previously authorized—again and again. It has already decided twice not to appropriate funds for

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[46] (Continued)

that it is lovely for the members of the Supreme Court to receive a $4,000 or $5,000 increase next month, and it is lovely for the members of the appellate and the district courts, judges that some of my friends do not like because of their busing orders, it is great to give them a pay increase and it is great to pay some third assistant to the President who is dealing with the chairman of the Committee on Appropriations and the leaders of the House of Representatives, so that they will perhaps make more money than the Members of the House of Representatives, that this is all very good." 122 *Cong. Rec.* H9367 (Sept. 1, 1976).

[47] Its purpose is to prevent Congress from *acting* by diminishing the compensation of the judges it criticizes.

cost of living increases in judges' salaries authorized by law.[48]

The Court of Claims opinion is relevant to, and casts uncertainty upon, the legality of past refusals to appropriate and other future actions that Congress may take. There is, therefore, a pressing need to clarify Congress's Constitutional obligation, and to obviate the undesirable possibility of continued litigation by judges over any or all of these additional actions Congress has taken, or will take, in respect to judicial pay. In plaintiffs' view, it is of critical importance to the maintenance of a proper con-

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[48] The Executive Salary Cost of Living Adjustment Act, 5 USC §5332, which was passed August 9, 1975, provides that judges shall receive an annual cost of living increase comparable to the average annual pay adjustment received by all other federal employees under the Federal Pay Comparability Act of 1970, 5 USC §5301 *et seq.* Congress, however, refused on October 1, 1976, pursuant to Pub. L. 94-440, to appropriate funds necessary to pay the cost of living adjustments which took effect October 1, 1976. Again, effective July 11, 1977, pursuant to Pub. L. 95-66, Congress refused to allow payment of the cost-of-living increases which would have taken effect in October of 1977.

In this particular situation, we see instances in which Congress, having fixed judicial salary levels by law, has diminished the compensation of judges simply by refusing to appropriate the necessary funds. There is no tenable distinction between that conduct and a straight forward reduction in judicial salary levels. Neither can either of these situations be rationally distinguished from the Senate's veto of the judicial pay adjustments made by the President in 1974. This entire situation calls for review by this Court *at this time,* since the question of whether to appropriate funds for cost-of-living adjustments which take effect automatically will arise every year, and the pay adjustments made pursuant to the Federal Salary Act of 1967 will face the possibility of legislative veto every four years.

stitutional relationship among the three branches of government that this Court specify the extent to which the Compensation Clause protects the judiciary by denying Congress powers that may threaten its independence and its integrity.

CONCLUSION

For the reasons set out above, Petitioners respectfully submit that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS

ARTICLE I SECTION 1

LEGISLATIVE POWERS VESTED IN CONGRESS.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

ARTICLE I, SECTION 7, CLAUSE 2

APPROVAL OR VETO OF BILLS—PASSAGE OVER VETO.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

ARTICLE II, SECTION 1, CLAUSE 1

PRESIDENT—TENURE.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

ARTICLE III, SECTION 1

SUPREME COURT AND INFERIOR COURTS—JUDGES AND COMPENSATION.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

STATUTORY PROVISIONS

2 U.S.C. §§358-360 provide as follows:

§358. Recommendations of the President with respect to pay.—The President shall include, in the budget next transmitted by him to the Congress after the date of the submission of the report and recommendations of the Commission under subsection (g) of this section [2 USCS §357], his recommendations with respect to the exact rates of pay which he deems advisable, for those offices and positions within the purview of subparagraphs (A), (B), (C), and (D) of subsection (f), of this section [2 USCS §356(A)-(D)]. As used in this subsection [section], the term "budget" means the budget referred to in section 201 of the Budget and Accounting Act, 1921, as amended (31 USC 11) [31 USCS §11].

(Dec. 16, 1967, P. L. 90-206, Title II, §225(h), 81 Stat. 644.)

§359. Effective date of recommendations of the President. — (1) Except as provided in paragraph (2) of this subsection [section], all or part (as the case may be) of the recommendations of the President transmitted to the Congress in the budget under subsection (h) of this section [2 USCS §358] shall become effective at the beginning of the first pay period which begins after the thirtieth day following the transmittal of such recommendations in the budget; but only to the extent that, between the date of transmittal of such recommendations in the budget and the beginning of such first pay period—

(A) there has not been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations,

(B) neither House of the Congress has enacted legislation which specifically disapproves all or part of such recommendations, or

(C) both.

(2) Any part of the recommendations of the President may, in accordance with express provisions of such recommendations, be made operative on a date later than the date on which such recommendations otherwise are to take effect. (Dec. 16, 1967, P. L. 90-206, Title II, §225(i), 81 Stat. 644.)

§360. Effect of recommendations of the President on existing law and prior presidential recommendations.—The recommendations of the President transmitted to the Congress immediately following a review conducted by the Commission in one of the fiscal years referred to in subsection (b)(2) and (3) of this section

[2 USCS §352(2), (3)] shall be held and considered to modify, supersede, or render inapplicable, as the case may be, to the extent inconsistent therewith—

(A) all provisions of law enacted prior to the effective date or dates of all or part (as the case may be) of such recommendations (other than any provision of law enacted in the period specified in paragraph (1) of subsection (i) of this section [USCS §359(1) of this title] with respect to such recommendations), and

(B) any prior recommendations of the President which take effect under this section [2 USCS §§351-361]. (Dec. 16, 1967, P. L. 90-206, Title II, §225(j), 81 Stat. 644.)

APPENDIX B

The Petitioners in these consolidated cases are listed below, in aphabetical order, followed by the appropriate Court of Claims case number and the Petitioner's District or Circuit Court:*

C. Clyde Atkins (No. 41-76) (S.D. Fla.)
George H. Barlow (No. 357-76) (D.N.J.)
Allen E. Barrow (No. 357-76) (N.D. Okla.)
John R. Bartels (No. 357-76) (E.D. N.Y.)
Louis C. Bechtle (No. 132-76) (E.D. Penn.)
Edward R. Becker (No. 132-76) (E.D. Penn.)
William H. Becker (No. 41-76) (W.D. Mo.)
Paul Benson (No. 357-76) (D. North Dakota)
John Biggs (No. 132-76) (CA 3rd)
C. Stanley Blair (No. 357-76) (D.Md.)
Luther Bohanon (No. 132-76) (W. & E.D.Okl.)
George H. Boldt (No. 357-76) (W.D. Wash.)
Jean S. Breitenstein (No. 357-76) (CA 10th)
Raymond J. Broderick (No. 132-76) (E.D. Penn.)
Frederick van P. Bryan (No. 357-76) (CA 10th)
Lloyd H. Burke (No. 41-76) (N.D. Calif.)
William J. Campbell (No. 132-76) (N.D. Ill.)
John M. Cannella (No. 357-76) (S.D. N.Y.)
Estate of Oliver J. Carter (No. 41-76) (N.D. Cal.)
Fred J. Cassibry (No. 41-76) (E.D. La.)

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* The Honorable Wade H. McCree has withdrawn voluntarily from this litigation because of his recent appointment as Solicitor General, as has the Honorable Donald R. Ross of the United States Court of Appeals for the Eighth Circuit. In addition, the following former plaintiffs have chosen not to participate in this petition for certiorari: Ruggero J. Aldisert (CA 3rd); James M. Carter (CA 9th); Ben C. Dawkins (W.D. La.); Floyd R. Gibson (CA 8th); William J. Nealon (M.D. Penn.); Bernard Newman (CC, N.Y.); Adrian A. Spears (W.D. Texas); Hubert I. Teitelbaum (W.D. Penn.)

Latham Castle (No. 357-76) (CA 7th)
Thomas J. Clary (No. 132-76) (E.D. Penn.)
Mitchell H. Cohen (No. 357-76) (D.N.J.)
Samuel Conti (No. 41-76) (N.D. Calif.)
James A. Coolahan (No. 357-76) (D.N.J.)
Howard F. Corcoran (No. 41-76) (D.C. D.C.)
Walter Early Craig (No. 41-76) (D.Ariz.)
Walter J. Cummings (No. 357-76) (CA 7th)
Jesse W. Curtis (No. 41-76) (C.D. Calif.)
Ronald N. Davies (No. 357-76) (D. North Dakota)
John Morgan Davis (No.357-76) (E.D. Penn.)
J. William Ditter, Jr. (No. 357-76) (E.D. Penn.)
J. Robert Elliott (No. 357-76) (M.D. Ga.)
Peter T. Fay (No. 41-76) (S.D. Fla.)
John Feikens (No. 357-76) (E.D. Mich.)
Wilfred Feinberg (No. 357-76) (CA 2nd)
Warren J. Ferguson (No. 41-76) (C.D. Calif.)
Robert Firth (No. 41-76) (C. D. Calif.)
Clarkson S. Fisher (No 357-76) (D.N.J.)
Roger D. Foley (No. 41-76) (D. Nev.)
Noel P. Fox (No. 357-76) (W.D. Mich.)
Ralph M. Freeman (No. 132-76) (E. D. Mich.)
Charles B. Fulton (No. 41-76) (S. D. Fla.)
Leonard I. Garth (No. 132-76) (CA 3rd)
James F. Gordon (No. 132-76) (W.D. Ky.)
Myron L. Gordon (No. 132-76) (E.D. Wisc.)
Estate of Wallace S. Gourley (No. 357-76) (W. D. Penn.)
William P. Gray (No. 41-76) (C. D. Calif.)
Lawrence Gubow (No. 357-76) (E.D. Mich.)
Peirson M. Hall (No. 132-76) (C.D. Calif.)
George B. Harris (No. 357-76) (N.D. Calif.)
Oren Harris (No. 357-76) (E. & W.D. Ark.)
George L. Hart, Jr. (No. 41-76) (D.C. D.C.)
Estate of John S. Hastings (No. 357-76) (CA 7th)
A. Andrew Hauk (No. 41-76) (C. D. Calif.)
A. Leon Higginbotham, Jr. (No. 132-76) (E. D. Penn.)
Irving Hill (No. 41-76) (C. D. Calif.)
Julius J. Hoffman (No. 132-76) (N. D. Ill.)
Daniel H. Huyett, III (No. 357-76) (E.D. Penn.)

Anthony Julian (No. 357-76) (D. Mass.)
Damon J. Keith (No. 132-76) (S.D. N.Y.)
James Lawrence King (No. 41-76) (S.D. Fla.)
Samuel P. King (No. 41-76) (D. Hawaii)
Alfred Y. Kirkland (No. 357-76) (N.D. Ill.)
Frederick B. Lacey (No. 357-76) (D.N.J.)
Thomas D. Lambros (No. 41-76) (N.D. Ohio)
Frederick Landis (No. 357-76) (CC, N.Y.)
Morris E. Lasker (No. 132-76) (S.D. N.Y.)
James L. Latchum (No. 357-76) (D.Del.)
Caleb R. Layton, III (No. 357-76) (D.Del.)
Joseph S. Lord (No. 41-76) (E.D. Penn.)
Miles W. Lord (No. 357-76) (D. Minn.)
Malcolm M. Lucas (No. 41-76) (C.D. Calif.)
Alfred L. Luongo (No. 132-76) (E.D. Penn.)
Lawrence T. Lydick (No. 132-76) (C.D. Calif.)
Estate of William J. Lynch (No. 41-76) (N.D. Ill.)
Thomas J. MacBride (No. 41-76) (E. D. Calif.)
Walter R. Mansfield (No. 41-76) (CA 2nd)
Albert B. Maris (No. 132-76) (CA 3rd)
Abraham L. Marovitz (No. 132-76) (N. D. Ill.)
Frank J. McGarr (No. 41-76) (N. D. Ill.)
Edward J. McManus (No. 132-76) (N. D. Iowa)
William O. Mehrtens (No. 132-76) (S. D. Fla.)
Bernard T. Moynahan, Jr. (No. 357-76) (E. D. Ky.)
C. A. Muecke (No. 132-76) (D. Ariz.)
Malcolm Muir (No. 357-76) (M.D. Penn.)
Edward R. Neaher (No. 357-76) (E.D. N.Y.)
Clarence C. Newcomer (No. 132-76) (E.D. Penn.)
Edmund L. Palmieri (No. 132-76) (S.D. N.Y.)
James B. Parsons (No. 41-76) (N.D. Ill.)
John W. Peck (No. 132-76) (CA 6th)
Robert F. Peckham (No. 41-76) (N.D. Calif.)
Martin Pence (No. 132-76) (D. Hawaii)
Joseph Sam Perry (No. 132-76) (N.D. Ill.)
Paul P. Rao (No. 357-76) (CC, N.Y.)
John W. Reynolds (No. 132-76) (E. D. Wisc.)
Scovel Richardson (No. 357-76) (CC, N.Y.)
Edwin A. Robson (No. 132-76) (N. D. Ill.)
Norman C. Roettger, Jr. (No. 41-76) (S. D. Fla.)

Samuel M. Rosenstein (No. 357-76) (CC, Miami, Fla)
Carl B. Rubin (No. 132-76) (S.D. Ohio)
Robert H. Schnacke (No. 41-76) (N.D. Calif.)
Murray M. Schwartz (No. 132-76) (D. Del.)
Nauman S. Scott (No. 357-76) (W.D. La.)
Woodrow Seals (No. 357-76) (S.D. Texas)
Collins J. Seitz (No. 41-76) (CA 3rd)
John V. Singleton, Jr. (No. 41-76) (S.D. Texas)
Talbot Smith (No. 357-76) (E.D. Mich.)
Herbert P. Sorg (No. 357-76) (W.D. Pa.)
Robert A. Sprecher (No. 41-76) (CA 7th)
Austin L. Staley (No. 357-76) (CA 3rd)
Edwin D. Steel, Jr. (No. 132-76) (D. Del.)
Albert Lee Stephens, Jr. (No. 41-76) (C.D. Calif.)
Herbert J. Stern (No. 357-76) (D. N.J.)
Bruce R. Thompson (No. 132-76) (D. Nev.)
Thomas P. Thornton (No. 357-76) (E.D. Mich.)
E. Mac Troutman (No. 357-76) (E.D. Pa.)
James A. von der Heydt (No. 132-76) (D. Alaska)
Francis C. Whelan (No. 41-76) (C.D. Calif.)
Lawrence A. Whipple (No. 357-76) (D. N.J.)
Hubert L. Will (No. 41-76) (N.D. Ill.)
David W. Williams (No. 41-76) (C.D. Calif.)
Spencer Williams (No. 41-76) (N.D. Calif.)
Harrison L. Winter (No. 41-76) (CA 4th)
Albert C. Wollenberg (No. 357-76) (N.D. Calif.)
John H. Wood, Jr. (No. 132-76) (W.D. Texas)
Caleb M. Wright (No. 357-76) (D. Del.)
George C. Young (No. 357-76) (M.D. Fla.)
Joseph H. Young (No. 41-76) (D. Md.)
Alfonso J. Zirpoli (No. 357-76) (N.D. Calif.)

APPENDIX C

FROM: Max Farrand, *The Records of the Federal Convention of 1787*, Vol. 2 (1966)

FARRAND AT PP. 44-45 (RE: JULY 18, 1787):

[Mr.] Mr[adison] moved that the Judges should be nominated by the Executive, & such nomination should become an appointment [if not] disagreed to within .. days by ⅔ of the 2d. branch. Mr. Govr. [Morris] 2ded. the motion. By common consent the consideration of it was postponed till tomorrow.

"[To hold their offices during good behavior" & "to receive fixed salaries" agreed to nem: con:]

"In which (salaries of Judges) no increase or diminution shall be made, [so as to affect the persons at the time in office."]

Mr. Govr. Morris moved to strike out "or increase". He thought the Legislature ought to be at liberty to increase salaries as circumstances might require, and that this would not create any improper dependence in the Judges.

Docr. Franklin [was in favor of the motion], Money may not only become plentier, but the business of the department may increase as the Country becomes more populous.

Mr. [Madison.] The dependance will be less if the *increase alone* should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in Court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to suffered, if it

can be prevented. The variations in the value of money, may be guarded agst. by taking for a standard wheat or some other thing of permanent value. The increase of business will be provided for by an increase of the number who are to do it. An increase of salaries may be easily so contrived as not to effect persons in office.

Mr. Govr. Morris. The value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners & the style of living in a Country. The increase of business can not be provided for in the supreme tribunal in the way that has been mentioned. All the business of a certain description whether more or less must be done in that single tribunal —Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited.

On the question for striking out "or increase".

Mas. ay. Cont. ay. Pa. ay. Del. ay. Md. ay. Va. no. N.C. no. S.C. ay. Geo. [absent] [Ayes—6; noes—2; absent—1.] [The whole clause as amended was then agreed to nem: con:]

. . . .

FARRAND AT PP. 429-430 (RE: AUGUST 27, 1787). Mr. Madison & Mr. McHenry moved to reinstate the words "increased or" before the word "diminished" in the 2d. Sect: Art. XI.

Mr. Govr. Morris opposed it for reasons urged by him on a former occasion—

Col: Mason contended strenuously for the motion. There was no weight he said in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries so made as not to affect persons in office, and this was the only argument on which much stress seemed to have been laid.

Genl. Pinkney. The importance of the Judiciary will require *men of the first talents: large salaries will therefore be necessary,* larger than the U.S. can allow in the first instance. He was not satisfied with the expedient mentioned by Col: Mason. He did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than the old ones.

Mr Govr Morris said the expedient might be evaded & therefore amounted to nothing. Judges might resign, & then be re-appointed to increased salaries.

On the question

N.H. no—Ct no. Pa no. Del. no—Md. divd Va ay—S.C. no—Geo. abst. [also Masts—N.J. & N—C—] [Ayes—1; noes—5; divided—1; absent—4.]

Mr. Randolph & Mr. Madison then moved to add the following words to sect 2, art XI, "nor increased by any Act of the Legislature which shall operate before the expiration of three years after the passing thereof"

On this question

N.H. no. Ct. no—Pa. no. Del. no. Md ay— Va ay—S. C. no Geo—abst [also Mas. N.J. & N.C.] [Ayes—2; noes—5; absent—4.]

This history suggests the following:

Madison, seeking to eliminate *all* possible dependence by the judiciary on Congress, and proposing that Article III, Section 1, prohibit Congress from either increasing or decreasing judges' salaries, had to meet the problem of inflation. Franklin immediately raised this issue, arguing that Madison's proposal to forbid increases would not allow nominal increases necessary to keep pace with an increased cost of living. Not so, Madison replied. Rather the "variations in the value of money may be guarded against by taking for a standard wheat or some other thing of permanent value." See 2 Farrand, *The Records of the Federal Convention of 1787,* 44-45, 429-30 (1966). Having said this, Madison introduced and rein-

troduced his proposal, which did not speak of wheat, but simply used the word "compensation." Since Madison knew the importance of protecting judges against inflation, since he wished to do so, and since he thought his clause forbidding increases and decreases did so, he must have thought that the language he proposed—"compensation"—meant "real" compensation. Otherwise, it could not have achieved his objective.

APPENDIX D

In the United States Court of Claims

(Decided May 18, 1977)

No. 41–76

C. CLYDE ATKINS, ET AL. v. THE UNITED STATES

No. 132–76

LOUIS C. BECHTLE, ET AL. v. THE UNITED STATES

No. 357–76

RUGGERO J. ALDISERT, ET AL. v. THE UNITED STATES

Arthur J. Goldberg, attorney of record for plaintiffs. *Stephen G. Breyer* and *Kevin M. Forde*, of counsel.

Assistant Attorney General Rex E. Lee, for defendant. *James F. Merow* and *Richard J. Webber*, of counsel.

Cornelius B. Kennedy filed a brief for Nelson A. Rockefeller, President of the United States Senate, as amicus curiae. *Kennedy, Webster & Gardner*, of counsel.

Eugene Gressman filed a brief for Frank Thompson, Jr., Chairman, Committee on House Administration, United States House of Representatives, as amicus curiae. *Arthur S. Miller*, of counsel.

Francis M. Wheat filed a brief for Los Angeles County Bar Association as amicus curiae. *John J. Quinn, Jr., Samuel L. Williams, John D. Taylor, David Ellwanger*, and *Brigitta Troy*, of counsel.
